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Via Electronic Comment Filing System

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

**Re: Written *Ex Parte* Response
In the Matter of Petition for Rulemaking to Amend the
Commission's Rules Governing Retransmission Consent, MB
Docket No. 10-71**

Dear Ms. Dortch:

On September 16, 2010, the National Telecommunications Cooperative Association filed an *ex parte* notice in the above-referenced proceeding on behalf of Clear Creek Mutual Telephone Company ("Clear Creek") with respect to a letter from Mr. Mitchell Moore, President of Clear Creek, relating to the above-captioned matter. That letter purports to describe Clear Creek's experience in negotiating a retransmission consent agreement with Fisher Communications, Inc. ("Fisher") for carriage of Station KATU-TV, Portland, Oregon, on Clear Creek's system. Clear Creek's letter, however, presents a decidedly one-sided view of the retransmission consent negotiations between the parties and of the retransmission consent process in general.

1. I was during the period in question (and remain today) the Fisher executive with responsibility for retransmission consent negotiations.

2. As Mr. Moore acknowledges, Clear Creek received timely notice of KATU's election for retransmission consent on September 29, 2008.

3. Despite receiving this election notice, Clear Creek made no attempt to begin negotiations. Instead, it was Fisher, not Clear Creek, that initiated negotiations for retransmission consent and carriage when I mailed a proposed agreement to Clear Creek on November 19, 2008, which Mr. Moore acknowledges Clear Creek received on November 24,

2008. From the beginning, Fisher took account of Clear Creek's relative size by proposing a simplified, short-form agreement, which Fisher routinely does for smaller MVPDs.

4. It was nearly a month later, on December 18, 2008, that I was first contacted by Clear Creek's outside counsel seeking confirmation that I was the appropriate representative to negotiate with. I responded the same day informing Clear Creek's counsel that I was.

5. It was not until December 29, 2008, that Fisher received Clear Creek's initial response to Fisher's proposal. In other words, Clear Creek did not respond until it had Fisher's proposal for nearly six weeks, until three full months from the date Clear Creek received KATU's election notice, and until there were only two days remaining before its authorization for carriage of KATU expired.

6. On December 30, 2008, the next day, Fisher responded with a proposed reduced and compromised rate, and I indicated that I would be available all day that day and the following day to conduct negotiations.

7. On December 31, 2008, I had numerous communications with Clear Creek's legal counsel. Initially, I was informed that Clear Creek's initial counteroffer was incorrect, and I was later provided with a revised offer. Fisher responded with a second rate reduction and compromise. Clear Creek's counsel subsequently communicated a new offer from Clear Creek. In response, at 7:11 pm, Fisher offered a third rate reduction and compromise. At 7:23 pm, Clear Creek's counsel acknowledged receipt of this offer. Shortly thereafter, at 7:34 pm, Clear Creek's counsel informed me that Clear Creek had rejected the offer, and I was asked whether Clear Creek should pull the Station's signal. At 7:54 pm, I responded, stating that I was "sorry to hear that they do not want to continue the negotiations. Please let them know that they may pull us." At 8:28 pm, Clear Creek's counsel stated that Clear Creek wanted to continue negotiations, but she did not have a counteroffer from Clear Creek. At 8:49 pm, I responded further by noting that Clear Creek's counsel had indicated that Clear Creek did not intend to make a counteroffer and clearly stating that "while Fisher would be happy to continue negotiations, unless we reach agreement on economic terms by midnight tonight, Clear Creek will no longer have Fisher's retransmission consent." I received no additional communications from Clear Creek or its counsel that evening.

8. Thus, with Fisher having made three rate concessions and compromises since its initial proposal, Clear Creek abandoned the negotiating table and allowed its authorization to carry KATU to expire and lapse.

9. On Friday, January 2, 2009, I was finally contacted again by Clear Creek's counsel. Later that day, Clear Creek's attorney communicated a new offer, and Fisher responded that same day with a fourth rate reduction and compromise.

10. On Monday, January 5, 2009, Clear Creek's counsel and Fisher's outside counsel communicated with each other.

11. On January 8, 2009, Mr. Moore sent a letter to Colleen Brown, President and CEO of Fisher, through outside counsel.

12. On January 9, 2009, which was nine days after Clear Creek's retransmission consent had expired and more than 50 days after I mailed Fisher's first proposal, I was, at last, able to speak with an executive of Clear Creek, rather than with Clear Creek's outside lawyer. I spoke with Mr. Moore; Fisher offered a fifth rate reduction and concession; and Mr. Moore agreed to the rate. Fisher also provided Clear Creek with temporary retransmission consent to enable the parties to finalize the paperwork, thereby enabling Clear Creek to re-launch KATU, which it did that day.

13. On January 16, 2009, the parties executed a retransmission consent agreement.

14. I declare, under penalty of perjury, that the facts set forth in numbered paragraphs 1-13 are true and correct to the best of my knowledge, information, and belief.

Clear Creek rhetorically asks whether the "tactics used by Fisher were heavy handed," whether Fisher "exert[ed] undue pressure," or whether the retransmission consent process is "flawed." Clear Creek answers its own question, after disparaging Fisher, by stating that the system is flawed because it permits a broadcast station "to leverage a brief negotiation period combined with the threat of withholding their signal to their advantage." And Clear Creek also says that "it is ultimately the rural consumer who suffers."

As the facts make clear, Fisher's actions were not heavy handed, Fisher did not exert undue pressure, and the system is not flawed. What was flawed was Clear Creek's cavalier attitude that it could wait until two days before its authorization to carry a broadcast station expired before it began substantive discussions, that it expected Fisher to be as unserious about reaching a fundamental understanding of the economic relationship between the parties before consenting for that relationship to continue, and that it could pin the blame for its own game of brinksmanship on the broadcaster after walking away from the negotiating table several hours before its retransmission authorization expired.

The facts show, even as acknowledged by Clear Creek, that Clear Creek was put on notice of the need to negotiate an agreement on September 29, 2008, that Clear Creek did not initiate negotiations, that Clear Creek received a proposal from Fisher on November 24, 2008, and that Clear Creek did not respond to that offer until December 29, 2008—in short, that the "brief negotiation period" of which Clear Creek complains was entirely of Clear Creek's own doing. Indeed, it was a "tactic"—surely not one best described as "light handed"—intended to exert "pressure" to dare the broadcast station to lose distribution to viewers.

The facts also show that Fisher made three rate concessions from its initial proposal before Clear Creek abandoned the negotiating table on the evening of December 31. It

subsequently made two additional rate concessions, for a total of *five* rate concessions, before the agreement was executed. Furthermore, Fisher promptly considered and responded to every Clear Creek offer.

Clear Creek also claims that smaller cable operators are forced to pay disproportionately higher per-subscriber fees than other larger operators in the same market. As an initial matter, volume discounts for greater distribution are common in many industries. Nevertheless, the rates Fisher negotiated with Clear Creek are consistent with the rates Fisher negotiated with dozens of other MVPDs, including some substantially larger than Clear Creek.

Clear Creek claims that it has singled out Fisher “in part as a reaction to Canby’s experience described in their comments.” Clear Creek also referenced Fisher’s *ex parte* response to false allegations leveled by Canby Telcom against Fisher in this docket. See Written *Ex Parte* Response of Fisher Communications, Inc., MB Docket No. 10-71 (filed August 30, 2010). Even a casual reader of Fisher’s response to Canby and of this letter will note a striking similarity in the chronology of events. That similarity is not coincidental since Clear Creek and Canby used the same outside counsel through whom all communications with Fisher were conducted until I personally spoke with Mr. Moore of Clear Creek and Mr. Keith Galitz of Canby separately on January 9, 2010. Perhaps the fact that Clear Creek has singled out Fisher “in part as a reaction to Canby’s experience described in their comments” is not coincidental either.

Clear Creek also makes several assertions about Fisher’s negotiations with other MVPDs, including that Fisher completed deals with large MSOs “well in advance” of deadlines while “smaller operators were approached much later, compressing the negotiation period.” Clear Creek’s assertions are without any factual basis. Fisher mailed its retransmission consent election notices to all MVPDs at about the same time. The only reason there was a “compressed” negotiation period for Clear Creek is because it intentionally waited until December 29, 2008, to respond for the first time. But the fact of the matter is that the negotiations only took 12 days, from December 29, 2008, when Clear Creek first engaged substantively on the negotiations, until January 9, 2009, when an agreement in principle was struck—including New Year’s Day and an intervening weekend. Those 12 days (9 business days) of negotiations could have occurred much earlier—“well in advance” of the expiration of Clear Creek’s carriage authorization—had Clear Creek not intentionally delayed the commencement of bilateral negotiations.

Clear Creek further claims that its costs for basic cable programming increased 252% in 2009 due to retransmission consent negotiations with six local television stations. However, Clear Creek provides no factual support for its statement or any basis to contextualize this number in terms of actual programming costs. As Clear Creek acknowledges, prior to this negotiation, it carried KATU for *free*. It is, therefore, meaningless to talk in terms of a percentage increase in programming costs that were formerly free. Recently, Charter Communications announced that it was adding a “broadcast surcharge” to consumers’ bills to reflect the payments it is making to local television stations

for retransmission consent, and it was reported that the amount in St. Louis is \$0.94 per month. See Kelsey Volkmann, "Charter Communications Adds Broadcast Surcharge," ST. LOUIS BUSINESS JOURNAL (Sept. 13, 2010). Although Clear Creek provides no basis for its percentage increase, if Clear Creek's programming costs for local Portland stations are about the same as Charter's for local St. Louis stations, this would mean Clear Creek's costs increased about \$0.67 per subscriber per month, spread across *six* local television stations—at least one of which, namely, Fisher's KATU, was previously free. Even if Clear Creek's costs were *double* Charter's, the increased amount of \$1.34 for six television stations is but a tiny fraction of what Clear Creek charges its customers for its service. See, e.g., Clear Creek Telephone and TeleVision, *Digital Starter Pak—Entertainment Gateway*, available at <http://www.ccmtc.com/cable_dg_starter_pak.cfm> (stating that Clear Creek's Digital Starter Pak, "our most popular package" and the least expensive package advertised online, is \$61.75 per month).

According to the Comments of CBS Corporation in this docket, MVPDs pay on average substantially higher monthly license fees for many cable networks, including \$4.43/month for ESPN, \$2.58/month for Fox Sports Net, \$0.91/month for Disney Channel, \$0.73/month for NFL Network, and \$0.57/month for USA Network. See Comments of CBS Corporation, MB Docket No. 10-71 (filed May 18, 2010), at 10. And according to the Comments of the National Association of Broadcasters and the four Affiliate Associations, the top 4 most highly rated cable networks cost \$5.95 per subscriber per month, see Comments of Broadcaster Associations, MB Docket No. 10-71 (filed May 18, 2010), at 33 (Table 1), but the ratings of local network stations dwarf the popularity by many times of even these most highly rated cable networks.

These averages, and reasonable assumptions about what Clear Creek is actually paying for local television stations, demonstrate that Clear Creek got a bargain for the right to carry KATU.

Finally, Clear Creek argues "reforms" are needed in the retransmission consent rules, including dispute resolution and a period of mandatory interim carriage during active negotiations. But Fisher's experience with Clear Creek shows that such calls for reform are hollow. The parties engaged in a period of active negotiations for just 9 business days until an agreement in principle was reached, with a definitive agreement signed 5 business days later, and this period was pushed to the last minute solely as a result of Clear Creek's approach to the negotiation process. Neither dispute resolution nor forced interim carriage would or could have accomplished any sooner, any better, or any less expensively what the marketplace achieved without government interference. While Clear Creek's customers may have been inconvenienced as a result of this negotiation, the disruption in service they experienced was due entirely to Clear Creek's negotiating tactics and its decision to walk away from the negotiating table well in advance of putting forth its best offer. Those tactics and that decision should—quite properly—be left to Clear Creek's discretion, not a government mandate. But the same must go for broadcasters as well.

For the reasons the National Association of Broadcasters and the four Affiliate

Associations, the broadcast television networks, and numerous other broadcasters have already provided in this docket, the Commission should allow market negotiations and processes to work without government interference.

Please let me know if I can provide any additional information concerning Fisher's negotiations with Clear Creek.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Randa Minkarah', with a long horizontal line extending to the right.

Randa Minkarah
SVP Business Development